

TO: Interested Parties
FR: Senate Republican Whip Jon Kyl and House Republican Whip Eric Cantor
DT: March 10, 2010
RE: Will the Democrats' "Go It Alone" Approach to Health Care Work?

Recently, President Obama endorsed using a partisan reconciliation process to override the objections of the American people and ram through Congress a government take-over of America's health care system:

"President Obama on Wednesday endorsed the controversial tactic known as reconciliation..." (The Washington Post, 3/3/10)

If all goes according to the Democrats' plan, the House will pass the Senate's health care overhaul and it will be signed into law, with its "kickbacks," "back-room deals," and the Senate version of the "Cadillac" tax increase. House Democrats then hope to "fix" some—but not all—of the problems with a fast-track reconciliation bill. The Senate would take up the House-passed reconciliation bill, pass it, and send it to the president for his signature. Finally, a series of fixes outside of reconciliation might move through both the House and Senate later.

If this sounds messy and a bit like a high-wire act, it should. Senate Majority Whip Dick Durbin said:

"If we go the reconciliation route, we will be testing some reconciliation rules and provisions that have never been tested before." (Politico, 3/3/10)

But let's be clear: House Democrats must pass the Senate's health care overhaul before the Senate will even consider "fixing" it. And, while it seems like Senate Majority Leader Harry Reid intends to take up the reconciliation package, **it is far from certain that he can get it through the Senate without any changes whatsoever.**

That could put nervous House Democrats in a position of being "BTU'ed," which is Washington-speak for a scenario where House members vote on an unpopular issue that the Senate refuses to take up, resulting in a significant loss of House seats in the following election.

House Democrat leaders have confirmed they are nervous about the Senate's lack of certainty:

"Members want some assurance that those items they have problems with are, in fact, modified before they vote for the Senate bill. I don't know that it's impossible, but it's difficult." (House Majority Leader Steny Hoyer (D-MD), Politico, 3/2/10)

"House Majority Whip James Clyburn (D-S.C.) said last month that the House did not trust the Senate's ability to act." (The Hill, 2/28/10)

BEFORE HOUSE DEMOCRATS VOTE ON THE SENATE'S UNPOPULAR HEALTH CARE OVERHAUL, HERE ARE SOME IMPORTANT CONSIDERATIONS:

1) House Democrats Must First Approve The Controversial Senate Bill

House Democrats may find comfort in focusing on a reconciliation bill that amends a small number of provisions in the Senate's health care bill, but that ignores two important points. First, the base bill, which will not change in reconciliation, is highly unpopular with the American people. Second, House Democrats must vote to approve the entire Senate bill, warts and all, before some of the objectionable provisions can be removed by the reconciliation bill. Here's what House Democrats will be voting for if they vote for the Senate bill:

- Increased health spending (according to CMS, bends cost curve up, not down)
- Nearly \$500 billion in Medicare cuts
- Over \$500 billion in tax increases
- Health insurance premium hikes
- \$1 trillion bill that relies on double counting and gimmicks
- Cornhusker Kickback
- Louisiana Purchase
- Carve-outs for Florida seniors only
- Tax on health care plans (JCT says will lead to increased health care costs for consumers)
- Targeted tax on small construction firms suffering from record employment losses

2) The Senate Provides No Certainty

It is not uncommon for the House to vote for a bill, only to see the legislation languish in the Senate. That concern is magnified when such legislation is so unpopular with the American public. Recently, House Democrats voted for a controversial scheme called Cap and Trade. To this date, the Senate has not taken up the House's Cap and Trade proposal. In fact, Senator John Kerry (D-MA) has declared it all but dead.

House Democrats must trust the Senate to complete the reconciliation two-step. Many don't:

"So they're going to say, 'Okay, vote for this bill, because it would do X,' but under reconciliation, X may not make it past the parliamentarian's gate... We're not sure what's in it [and] we don't know whether it'll pass the Senate anyway." (Congressman Brian Baird (D-WA), Salon, 3/3/10)

Let's break down the problems Democrats will face with reconciliation:

A. Reconciliation Cannot Be Used to Make Policy Changes:

Provisions included in reconciliation must deal directly and primarily with spending and revenue. Provisions that have no budgetary impact or that have a budgetary impact that is merely incidental to the policy goal of the provisions (a determination which is made by the Senate Parliamentarian -- see below for further discussion) are subject to the "Byrd Rule" and, as such, a point of order. ***Overcoming the Byrd Rule point of order requires 60 votes.***

According to the former Senate Parliamentarian:

“Part of the Byrd Rule is that if something is in there, not for its budgetary effect, but for its policy effect, that invokes something called the incidental test and it can be thrown out.”
(Former Senate Parliamentarian Robert Dove, MSNBC, 3/1/10)

This means that Democrats probably cannot use the reconciliation bill to make changes to abortion and immigration provisions, or to include the President’s new insurance regulation proposal. At face value, these would appear to violate the Byrd Rule.

It also means that provisions that were added to the original House bill to gain the support of certain lawmakers cannot be included in reconciliation. For example, **Rep. Dennis Cardoza (D-CA)** publicly stated that he voted for the House bill only after adding a provision authorizing a new program to benefit medical centers in his district. That provision, which is not in the Senate bill, would appear to be subject to the Byrd Rule point of order.

Even the president’s proposal to hold the Social Security trust fund harmless from the impact of his proposed changes may run afoul of the requirement that reconciliation cannot make any changes to the Social Security program.

B. Reconciliation Contains Several Complicated Deficit Tests:

The reconciliation bill must reduce the deficit over the next five years, and it must not increase the deficit over ten years (2010 to 2019) or increase the deficit by more than \$5 billion in any of the four consecutive 10-year periods (2020-2029, 2030-2039, 2040-2049, or 2050-2059).

Why is this important? The president has proposed increased spending, scaling back the “Cadillac” tax, and imposing higher Medicare taxes to cover the difference. But because revenue from the “Cadillac” tax was projected to grow much more quickly than revenue from the Medicare tax will grow¹, additional taxes may be needed—even beyond what is being suggested in the press. How can the American economy, and small businesses in particular, begin to create jobs if even more taxes are imposed?

C. Chances Are Good That The House Will Have To Vote On The Reconciliation Bill Twice:

While many are speculating as to what provisions the Senate Parliamentarian will determine violate the Byrd Rule, it is only speculation. In the past, the Senate Parliamentarian has refrained from giving a definitive ruling on items that may violate the Byrd Rule until the bill is on the Senate floor. If the point of order is sustained and not waived by 60 senators, then the provision is stripped from the bill and the remainder of the bill is sent back to the House.

Consider, for example, the last time Congress considered a controversial bill under reconciliation, the Deficit Reduction Act of 2005. The House passed a conference report on

¹ Revenues from the Cadillac tax are expected to grow by 10 to 15% a year in the second decade, according to CBO, whereas revenues from the Medicare tax would only grow at about 5% a year. In addition, the health care subsidies that the president proposes to expand would grow by approximately 8% thereby out pacing the 5% tax increase.

the bill that it believed would survive all Byrd Rule points of order. The Senate ultimately sustained three points of order (one relating to cost sharing for emergency room care). *The House then had to revote on the bill minus the three provisions.*

3) Less Senate Support Puts House Democrats in Difficult Position and Could Mean Senators Will Support Amendments to the Reconciliation Bill

- A. With 59 Senate Democrats and Independents, up to nine Democratic Senators can vote against the bill on passage or on any given amendment (with Vice President Biden breaking any ties). But at one time or another, as many as twelve Senate Democrats have expressed concerns about using reconciliation to facilitate enacting a health care overhaul.

Those twelve Senate Democrats represent nine states. At a minimum, the Senators who vote NO on final passage of reconciliation will be putting House Democrats from their states who may have already voted YES in a difficult position, given how extremely unpopular the health care overhaul is with the American public. These House Democrats could be particularly affected by that dynamic:

Congressman Marion Berry (AR)
Congressman Rick Boucher (VA)
Congressman Russ Carnahan (MO)
Congressman Gerry Connolly (VA)
Congressman Joe Donnelly (IN)
Congressman Brad Ellsworth (IN)
Congressman Baron Hill (IN)
Congressman Steve Kagen (WI)

Congressman Charlie Melancon (LA)
Congressman Alan Mollohan (WV)
Congressman Glenn Nye (VA)
Congressman Tom Perriello (VA)
Congressman Nick Rahall (WV)
Congressman Mike Ross (AR)
Congressman Ike Skelton (MO)
Congressman Vic Snyder (AR)

- B. In the Senate, it may take just 51 votes to pass reconciliation, but it also only takes 51 votes to adopt germane amendments.
- The germaneness test for amendments to a reconciliation bill in the Senate could be fairly broad (possibly as broad as the jurisdiction of the Finance and HELP committees); meaning popular amendments might garner 51 votes.
 - Also, the amending process in the Senate can be fairly chaotic. Once debate time has concluded the amending process continues with votes being held in rapid succession (so-called “vote-a-rama” or “vote-a-thon”). This is the time when discipline could break down and amendments could be adopted, which would send the bill back to the House.

4) A Second “Clean-up” Bill Is Highly Unlikely

There is some speculation that the provisions of the Senate bill that could not be fixed using reconciliation might be fixed in a separate bill that would not have reconciliation protection. This is highly unlikely for two reasons:

- Most major bills in the Senate have to meet a 60 vote threshold for passage. If the Majority had 60 votes to fix the Senate-passed bill, then there would be no need for them

to try to use reconciliation. There has been some public discussion about a third bill (not reconciliation) to address the abortion issue. It should be noted that when language similar to the “Stupak language” was offered by Senator Ben Nelson (D-NE), the amendment only received 45 votes.

- Controversial bills cannot be done quickly in the Senate. Even routine bills can take several days because the Senate generally allows for amendment. After spending all of December and a week or two on a reconciliation bill, does anyone believe that Senator Reid would be willing to spend time on a third health care bill?

5) So What Will Happen?

In the world of legislating, nothing is certain. But, what is clear is that House Democrats cannot count on the Senate being able to pass a reconciliation bill that makes all the fixes to the Senate health care bill currently being sought.

House Democrats who vote for the Senate health care overhaul can be certain of one thing if it passes—it will become law over the objections of the American people. And they will spend the rest of the year explaining that vote, whether or not the Senate passes a reconciliation bill to “fix” it.

With that in mind, we believe House passage of the Senate’s health care bill will ultimately be decided by the 37 remaining House Democrats who voted NO to a government take-over last November, and the following 21 House Democrats who originally voted YES, but may now be on the fence:

Congressman Michael Arcuri (NY)
Congressman Marion Berry (AR)
Congressman Tim Bishop (NY)
Congressman Dennis Cardoza (CA)
Congressman Chris Carney (PA)
Congressman Jim Costa (CA)
Congressman Joe Donnelly (IN)
Congressman Steve Driehaus (OH)
Congressman Brad Ellsworth (IN)
Congressman Gabrielle Giffords (AZ)
Congressman Baron Hill (IN)

Congressman Paul Hodes (NH)
Congressman Dan Maffei (NY)
Congressman Harry Mitchell (AZ)
Congressman Bill Owens (NY)
Congressman Earl Pomeroy (ND)
Congressman Mark Schauer (MI)
Congressman Kurt Schrader (OR)
Congressman Zach Space (OH)
Congressman Dina Titus (NV)
Congressman Charlie Wilson (OH)